

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE NORTHERN DISTRICT OF ALABAMA  
3                   WESTERN DIVISION

4           JANICE MORGAN, et al.,                   \*  
5                   Plaintiffs,                   \*     CV-01-UWC-0303-W  
6   \*     March 3, 2006  
7           vs.                                   \*     Tuscaloosa, Alabama  
8   \*     9:00 A.M.  
9           FAMILY DOLLAR STORES, INC.,       \*  
10                   Defendant.               \*  
11           \*\*\*\*\*

12                                   VOLUME 8  
13                   TRANSCRIPT OF JURY TRIAL  
14                   BEFORE THE HONORABLE CHIEF JUDGE U.W. CLEMON  
15                                   And a Jury

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1 March 3, 2006

9:00 a.m.

2 PROCEEDINGS:

09:04:27 3 THE COURT: Good morning, ladies and  
09:14:01 4 gentlemen. I trust you had a good evening.

09:14:50 5 I will now explain to you the rules of law  
09:14:52 6 that you must follow and apply when deciding the case.  
09:14:58 7 When I have finished, you will go back to the jury room  
09:15:00 8 and begin your deliberations.

09:15:02 9 In deciding the case, you must follow and  
09:15:06 10 apply all the law as I shall give it to you, whether you  
09:15:11 11 agree with that law or not. And you must not let your  
09:15:16 12 decision be influenced in any way by sympathy or by  
09:15:20 13 prejudice, for or against anyone.

09:15:24 14 The fact that a corporation is involved as a  
09:15:28 15 party in the case should not influence your decision in  
09:15:30 16 any way. A corporation and all other persons stand  
09:15:35 17 equal before the law and are to be dealt with as equals  
09:15:38 18 in a court of justice.

09:15:41 19 Where a corporation is involved, of course,  
09:15:43 20 it may act only through natural persons, as its agents  
09:15:47 21 and employees. And, in general, a corporation is  
09:15:52 22 responsible under the law for the acts and statements of  
09:15:56 23 its employees made within the scope of their duties, as  
09:16:00 24 employees of the corporation.

09:16:03 25 In your deliberations, you should consider

09:16:06 1 only the evidence; that is, the testimony of the  
09:16:09 2 witnesses from the witness stand, and the exhibits that  
09:16:13 3 you will have with you in the jury room. But as you  
09:16:16 4 consider the evidence, both direct and circumstantial,  
09:16:20 5 you may make deductions and reach conclusions which  
09:16:24 6 reason and common sense leads you to make.

09:16:29 7 Direct testimony or "direct evidence" is  
09:16:32 8 the testimony of one who asserts actual knowledge of a  
09:16:36 9 fact, such as an eyewitness. "Circumstantial evidence"  
09:16:41 10 is proof of a chain of facts and circumstances tending  
09:16:45 11 to prove or disprove any particular fact. The law makes  
09:16:51 12 no distinction between the weight to be given to direct  
09:16:53 13 or circumstantial evidence, it simply says that you must  
09:16:57 14 consider all of the evidence in reaching your decision.

09:17:02 15 Remember that anything the lawyers say is  
09:17:04 16 not evidence. And except for the instructions that I am  
09:17:08 17 now giving you in this case, you should disregard  
09:17:11 18 anything that I've said during the trial in reaching  
09:17:15 19 your own conclusion as to what the facts are. Again, I  
09:17:21 20 remind you that you should not give any special weight  
09:17:23 21 to any question I put to a witness or the witness'  
09:17:28 22 answer to that question. This is so, because you are  
09:17:32 23 the only judges of the facts in the case.

09:17:39 24 In considering the evidence, you are not  
09:17:42 25 required to accept all of it as being true or accurate.

09:17:47 1 You should decide whether you believe what a witness had  
09:17:51 2 to say and how important that witness' testimony was.  
09:17:58 3 In making that decision, you may believe or disbelieve  
09:18:03 4 all, some, or none of the testimony of a witness. Also,  
09:18:09 5 the number of witnesses testifying to a particular fact  
09:18:13 6 is not controlling.

09:18:16 7 In deciding whether you will believe the  
09:18:19 8 testimony of a witness, and if so, the extent to which  
09:18:25 9 you will rely on that testimony, I suggest that you ask  
09:18:28 10 yourself a few questions. First, did the witness  
09:18:34 11 impress you as one who was telling the truth? Did the  
09:18:38 12 witness have any particular reason not to tell the  
09:18:41 13 truth? Did the witness stand to gain or lose something  
09:18:45 14 by his or her testimony? Did the witness have a good  
09:18:51 15 memory? Did the witness have the opportunity and the  
09:18:55 16 ability to observe accurately the things he or she  
09:19:00 17 testified about? Did the witness appear to be answering  
09:19:04 18 the questions directly, or did the witness appear to be  
09:19:07 19 trying to evade answering certain questions to obscure  
09:19:15 20 certain facts? Was the witness' testimony supported by  
09:19:19 21 other evidence in the case?

09:19:22 22 You have the right to believe as much of a  
09:19:26 23 witness' testimony as you find worthy, and then to  
09:19:30 24 reject the rest of it. I point out to you that a simple  
09:19:35 25 mistake by a witness does not necessarily mean that the

09:19:38 1 witness was not telling the truth as he or she remembers  
09:19:41 2 it, because people naturally tend to forget some things  
09:19:47 3 and to remember other things inaccurately. So if a  
09:19:51 4 witness has made a misstatement, you need to determine  
09:19:57 5 or consider whether that misstatement was an innocent  
09:20:02 6 error, lapse of memory on the part of the witness, or  
09:20:08 7 whether the witness was deliberately trying to deceive  
09:20:11 8 you. The significance of that may turn on whether the  
09:20:18 9 discrepancy or the inconsistency relates to an important  
09:20:22 10 matter, or an unimportant detail.

09:20:28 11 I will now talk about the burden of proof.  
09:20:31 12 In this case, each party making a claim or defense has  
09:20:38 13 the burden or the responsibility of proving each  
09:20:42 14 essential element, each part of that claim, by what the  
09:20:51 15 law calls a "preponderance of the evidence".

09:20:58 16 Now, the standard of proof in a civil case  
09:21:01 17 such as this is not the same; indeed, it's quite  
09:21:08 18 different from the standard of proof in a criminal case.  
09:21:10 19 In a criminal case, you remember the state has to prove  
09:21:13 20 a defendant's guilt beyond a reasonable doubt. That's  
09:21:16 21 the highest standard of proof known in our system of  
09:21:20 22 law. That's not the standard of proof in a civil case  
09:21:25 23 such as this.

09:21:27 24 Each party making a claim or defense has to  
09:21:37 25 produce enough evidence to convince you that the claim

09:21:45 1 is more likely true than not true. In other words, the  
09:21:55 2 burden of proof is to show that the claim or defense is  
09:22:01 3 probably true.

09:22:08 4 You should consider all of the evidence with  
09:22:13 5 respect to each claim or defense in the case. You  
09:22:19 6 should consider all of the evidence produced by all of  
09:22:21 7 the parties, and it doesn't matter which side produced  
09:22:28 8 the evidence. But if the proof fails to establish that  
09:22:35 9 the claim or the defense is probably true, then you  
09:22:45 10 should find against the party having the burden of proof  
09:22:49 11 as to that claim.

09:22:53 12 In this case, the plaintiffs have brought an  
09:23:04 13 action under the labor law, called the Fair Labor  
09:23:09 14 Standards Act. It's sometimes also called the overtime  
09:23:14 15 law. And the plaintiff makes two claims, really.

09:23:20 16 First, the plaintiffs say that their  
09:23:24 17 employer, Family Dollar, violated the overtime law; and  
09:23:31 18 second, the plaintiffs say that the violation was  
09:23:37 19 willful, with respect to the first claim.

09:23:44 20 The Fair Labor Standards Act requires an  
09:23:48 21 employer to pay its employees at a rate at least one and  
09:23:53 22 a half times their regular rate for the time worked over  
09:24:00 23 40 hours in any one workweek. The regular rate for a  
09:24:06 24 week is determined by dividing the salary by the number  
09:24:12 25 of hours which the salary is intended to compensate.

09:24:17 1 The overtime rate, then, would be one and a half of that  
09:24:22 2 rate.

09:24:25 3 This is what is called a collective action  
09:24:30 4 under the Fair Labor Standards Act. The case was filed  
09:24:34 5 by three plaintiffs -- Janice Morgan, Barbara Richardson  
09:24:40 6 and Cora Cannon. All of the -- each of these was a  
09:24:44 7 store manager for Family Dollar. All of the other store  
09:24:49 8 managers who are making claims in this case voluntarily  
09:24:55 9 joined in the lawsuit filed by the three named  
09:25:00 10 plaintiffs -- they opted into the lawsuit.

09:25:06 11 Now, it is not necessary that all of these  
09:25:11 12 claimants have to testify in order to prove that Family  
09:25:18 13 Dollar violated the Fair Labor Standards Act. Rather,  
09:25:22 14 they may rely on what the law calls representative  
09:25:27 15 testimony.

09:25:29 16 Representative testimony means the  
09:25:31 17 testimony of a relatively few number of witnesses in  
09:25:36 18 order to establish a pattern of behavior among a larger  
09:25:40 19 class of employees. The testimony of an employee can be  
09:25:45 20 -- can only be representative of other employees who  
09:25:48 21 perform substantially similar work.

09:25:53 22 Now, because the non-testifying plaintiffs  
09:25:55 23 have relied on representative testimony, it is not  
09:25:58 24 necessary that Family Dollar prove that each of the  
09:26:05 25 non-testifying employees was an executive, and thus

09:26:08 1 exempt from the overtime requirements. And I'll tell  
09:26:12 2 you about Family Dollar's affirmative defense in a  
09:26:16 3 moment. If Family Dollar proves that the representative  
09:26:21 4 plaintiffs who did testify are, in fact, exempt  
09:26:24 5 employees, then it would have carried its burden of  
09:26:29 6 proof as to the non-testifying plaintiffs.

09:26:33 7 On the other hand, if Family Dollar fails to  
09:26:36 8 carry its burden of proof with respect to the plaintiffs  
09:26:39 9 who did testify, then it would have also failed to carry  
09:26:43 10 its burden with respect to the non-testifying  
09:26:49 11 plaintiffs.

09:26:53 12 I indicated to you that plaintiffs' first  
09:26:57 13 claim is that Family Dollar Stores violated the Fair  
09:27:04 14 Labor Standards Act. In order to prevail on their  
09:27:09 15 overtime claim, the named plaintiffs must prove that  
09:27:13 16 each of the following things is true: First -- and when  
09:27:19 17 I finish telling you this, I'll tell you that they  
09:27:22 18 proved it. It's more or less stipulated. First, each  
09:27:26 19 of them must prove that he was employed or she was  
09:27:31 20 employed by Family Dollar Stores between 1999 and the  
09:27:37 21 present date. Family Dollar doesn't deny that.

09:27:41 22 Second: The plaintiffs must prove that  
09:27:46 23 Family Dollar was engaged in interstate commerce; and  
09:27:49 24 Family Dollar doesn't deny that.

09:27:52 25 Third, they must prove that Family Dollar

09:27:54 1 failed to pay them overtime; and Family Dollar doesn't  
09:28:01 2 deny that. So you should consider plaintiffs as having  
09:28:06 3 met their burden of proof, that they were not paid  
09:28:11 4 overtime.

09:28:13 5 But that, ladies and gentlemen, is just the  
09:28:15 6 beginning of the inquiry. Because under the law, there  
09:28:23 7 are certain categories of employees for whom overtime is  
09:28:31 8 not required. And Family Dollar says that these store  
09:28:40 9 managers fall into the "executive" exemption. And if  
09:28:48 10 they fall into that exemption, then the law says that  
09:28:52 11 Family Dollar is not required to pay them overtime.

09:28:58 12 Now, exemptions to the Fair Labor Standards  
09:29:04 13 Act are ordinarily construed against the employer. And  
09:29:08 14 basically, what the defendant Family Dollar has to show  
09:29:12 15 is that they were probably -- that it was probably not  
09:29:17 16 required to pay overtime to these employees because they  
09:29:21 17 were executives.

09:29:25 18 You should be mindful that a job title  
09:29:28 19 alone, such as "store manager", is insufficient to prove  
09:29:36 20 that an employee is an executive. The executive status,  
09:29:44 21 or lack of it, of any particular worker is to be  
09:29:48 22 determined on the basis of whether the employee's salary  
09:29:53 23 and job duties meet the specific requirements of the  
09:29:56 24 Fair Labor Standards Act.

09:29:58 25 Now, there are two sets of standards

09:30:03 1 applicable to the claims in this case. In 2004 -- April  
09:30:09 2 23rd, 2004, Congress changed the Fair Labor Standards  
09:30:14 3 Act and it added a new requirement, which I'll talk  
09:30:17 4 about. It added that now requirement to the other three  
09:30:24 5 requirements. But the three basic requirements are  
09:30:29 6 these -- these are the three things that Family Dollar  
09:30:35 7 has to prove in order to prevail on its executive  
09:30:40 8 exemption defense.

09:30:44 9 First: It has to prove that each of the  
09:30:47 10 plaintiffs was paid a salary of at least \$250; that is,  
09:30:54 11 for the plaintiffs who worked as store managers before  
09:31:00 12 April the 23rd, 2004. It has to prove that each of  
09:31:06 13 those was paid a salary of at least \$250. And the  
09:31:10 14 plaintiffs concede that all of them were paid at least  
09:31:14 15 \$250. So that, you must take that as having been  
09:31:20 16 proved.

09:31:23 17 Secondly: Family Dollar must prove that the  
09:31:33 18 primary duty of these plaintiffs was managerial,  
09:31:45 19 executive. That was their primary duty.

09:31:50 20 Third: Family Dollar must prove that the  
09:31:57 21 plaintiffs customarily and regularly directed the work  
09:32:03 22 of two or more full-time employees.

09:32:12 23 So basically, in this case, given the facts  
09:32:17 24 as they have developed, Family Dollar has to prove two  
09:32:22 25 things for those plaintiffs who were store managers

09:32:25 1 before April the 23rd, 2004: That their primary duty  
09:32:30 2 was management; and secondly, that they supervised at  
09:32:36 3 least -- that they regularly and customarily supervised  
09:32:42 4 the work of at least two full-time employees, or their  
09:32:48 5 equivalent.

09:32:52 6 With respect to the primary duty element.  
09:32:57 7 "Primary duty" means the main, major, or most important  
09:33:02 8 duty performed by the employee. In determining whether  
09:33:07 9 an employee's duties are his or her primary duty, you  
09:33:13 10 should consider all of the facts surrounding the  
09:33:16 11 employment.

09:33:17 12 The amount of time spent by an employee in  
09:33:20 13 the performance of executive or managerial duties is a  
09:33:24 14 useful guide in determining whether such duties are  
09:33:27 15 primary. The "rule of thumb" is that "primary duty"  
09:33:32 16 means that the major part, or more than 50 percent of  
09:33:36 17 the employee's time was spent in performing executive  
09:33:40 18 duties. But time alone is not the only factor in  
09:33:45 19 determining whether the employee's duties were  
09:33:48 20 managerial -- were primarily managerial.

09:33:54 21 An employee's primary duty may be executive  
09:33:57 22 even if the employee spends less than half of his or her  
09:34:01 23 time in such work. In determining the primary duty, you  
09:34:06 24 should consider the following factors: The relative  
09:34:13 25 importance of the employee's executives duties as

09:34:16 1 compared with the employee's non-executive duties; the  
09:34:20 2 frequency with which the employee exercises  
09:34:23 3 discretionary powers; the employee's relative freedom  
09:34:30 4 from supervision; and the relationship between the  
09:34:35 5 employee's salary and the wages paid to other employees  
09:34:40 6 for the kind of non-executive work performed by the  
09:34:43 7 employee making the claim.

09:34:55 8           Job title alone, as I alluded to earlier, is  
09:34:59 9 insufficient to establish that an employee is an  
09:35:02 10 executive. Company policies, standing alone, don't  
09:35:08 11 establish that an employee is or is not an executive.  
09:35:14 12 The executive status must be determined on the basis of  
09:35:17 13 whether the employee's salary and actual job duties meet  
09:35:22 14 the requirements.

09:35:25 15           An executive employee may sometimes perform  
09:35:28 16 non-exempt or non-managerial duties concurrent with his  
09:35:33 17 executive duties, so long as the non-exempt duties are  
09:35:39 18 not his primary duties.

09:35:42 19           "Non-exempt" or non-managerial work includes  
09:35:44 20 such work as loading and unloading merchandise, stocking  
09:35:50 21 merchandise, production work, and clerical work.

09:35:55 22           In determining whether a store manager is an  
09:35:57 23 executive, you should consider the nature of the work  
09:36:01 24 performed by the store manager. For example, these  
09:36:07 25 plaintiffs claim that they were "working foremen". A

09:36:11 1 "working" or "supervising" foreman works alongside his  
09:36:15 2 or her subordinates, performing the same kind of work as  
09:36:20 3 the subordinates, and carrying out supervisory  
09:36:25 4 functions. But working foremen are not executives  
09:36:30 5 within the meaning of the law.

09:36:35 6 On the second element, the two full-time  
09:36:42 7 employees or the equivalent. As a general rule,  
09:36:48 8 supervising two employees means supervising two  
09:36:53 9 individual employees, each of whom works 40 hours a  
09:36:58 10 week. Supervising any combination of full or part-time  
09:37:02 11 employees, whether total hours supervised, exceeds 80  
09:37:07 12 hours will also meet the requirement. Hours worked by  
09:37:12 13 an employee cannot be credited more than once for  
09:37:16 14 different executives. Thus, a shared responsibility for  
09:37:20 15 the supervision of two -- of the same two employees in  
09:37:24 16 the same store does not satisfy the requirement.

09:37:31 17 Continuous physical presence at a store is  
09:37:36 18 not an essential requirement for supervision, so long as  
09:37:41 19 the supervision is manifested in some other way such as  
09:37:44 20 scheduling work shifts or "on-call" availability.

09:37:49 21 If you find that any of the plaintiffs or  
09:37:54 22 opt-ins did not customarily and regularly supervise two  
09:37:59 23 full-time employees or their equivalent, then you just  
09:38:03 24 find that those employees are not executive employees.

09:38:10 25 In that regard, you're instructed that I

09:38:14 1 have decided as a matter of law that the defendant has  
09:38:16 2 not carried its burden of proof of the two full-time  
09:38:23 3 employees or equivalent for 162 of the plaintiffs.  
09:38:29 4 They're shown on Defendant's Exhibit 1742C. And for  
09:38:36 5 those plaintiffs, you will only decide the amount of  
09:38:41 6 damages, the amount of overtime they're entitled to, and  
09:38:46 7 whether Family Dollar acted willfully in failing to pay  
09:38:55 8 them the required overtime.

09:39:00 9 As to the other plaintiffs, it's up to you  
09:39:03 10 to decide whether Family Dollar has carried its burden  
09:39:09 11 of proof that they supervised two full-time employees or  
09:39:16 12 their equivalent. Now, that was the standard or that is  
09:39:25 13 the standard with respect to those plaintiffs who worked  
09:39:30 14 as store manager -- store managers for Family Dollar up  
09:39:36 15 to April the 23rd, 2004. As I indicated, the law  
09:39:41 16 changed on that date, so that now there is a -- in  
09:39:49 17 effect, for our purposes, an additional requirement.

09:39:53 18 Now, in addition to -- for those store  
09:39:59 19 managers who worked as store managers after April 23rd,  
09:40:03 20 2004, in addition to showing that managerial duties were  
09:40:12 21 their primary duty, and that they supervised two  
09:40:15 22 full-time employees or their equivalent, Family Dollar  
09:40:19 23 must also show that the plaintiff had the authority or  
09:40:27 24 has the authority to hire or fire, promote other  
09:40:36 25 employees, or make recommendations concerning such

09:40:41 1 matters that are given particular weight. This  
09:40:51 2 additional requirement kicks into play as of April the  
09:40:57 3 23rd, 2004.

09:41:07 4 The new regulations also indicate that work  
09:41:10 5 that is directly or closely related to the performance  
09:41:13 6 of executive work is also considered executive work.  
09:41:18 7 The phrase "directly and closely related" work may  
09:41:22 8 include physical tasks and menial tasks that arise out  
09:41:26 9 of executive duties, and the routine work without which  
09:41:31 10 the executive employees executive work cannot be  
09:41:34 11 performed properly.

09:41:40 12 So let me summarize. The burden of proof  
09:41:48 13 for Family Dollar, as we sit here, for all of the  
09:42:01 14 plaintiffs, Family Dollar has to prove that their  
09:42:13 15 executive duties, managerial duties were their primary  
09:42:19 16 duty.

09:42:20 17 Secondly, it must prove that they supervised  
09:42:27 18 at least two full-time employees, or their equivalent.

09:42:34 19 And then, with respect to those who worked  
09:42:37 20 as managers after April 23rd, 2004, it must show that  
09:42:47 21 they either had the authority to hire, promote,  
09:42:51 22 discharge, or that their recommendations concerning  
09:42:56 23 hiring, promotions, discharges, those kinds of things,  
09:43:00 24 were given particular weight.

09:43:03 25 If it proves these things, then it would

09:43:07 1 have carried its burden of proof of executive exemption,  
09:43:13 2 except with respect to the 162 employees that I've told  
09:43:17 3 you about.

09:43:17 4 If it fails to prove both of these things,  
09:43:24 5 then it would have failed in its burden, and the  
09:43:31 6 plaintiffs would be entitled to recover.

09:43:36 7 I have mentioned to you that the plaintiffs  
09:43:39 8 have made a second claim, and that's the claim of  
09:43:42 9 willfulness. And the burden of proof, obviously, is on  
09:43:45 10 the plaintiffs with respect to that claim.

09:43:47 11 To prove that an employer acted "willfully",  
09:43:51 12 a plaintiff must establish that the employer probably  
09:43:58 13 knew or showed reckless regard for the fact that its  
09:44:05 14 conduct was forbidden by the Fair Labor Standards Act.  
09:44:11 15 New or showed reckless regard for the law. If the  
09:44:18 16 plaintiff -- plaintiffs failed to carry that burden of  
09:44:23 17 proof, then you will so indicate in your verdict form.

09:44:28 18 Now, if the defendant fails to convince you  
09:44:33 19 that the plaintiffs are executive employees -- and, in  
09:44:38 20 any event, with respect to the 162 plaintiffs for which  
09:44:42 21 judgment as a matter of law has been granted, you must  
09:44:47 22 consider the damages that the plaintiffs are entitled  
09:44:51 23 to. And the law says that the measure of damages that  
09:44:59 24 the plaintiffs are entitled to for violation of the Fair  
09:45:03 25 Labor Standards Act is the difference between what they

09:45:08 1 were actually paid, and what they should have been paid  
09:45:13 2 in overtime wages under the Fair Labor Standards Act.

09:45:21 3 Now, you compute those damages from two  
09:45:27 4 years before the filing of the lawsuit for the named  
09:45:30 5 plaintiffs, the three named plaintiffs; and they filed  
09:45:34 6 this lawsuit on January the 31st, 2001. So you'd go  
09:45:38 7 back to January 31st, 1999 -- two years back, up to the  
09:45:47 8 date that they last worked for Family Dollar. And for  
09:45:51 9 those employees -- those plaintiffs or opt-ins who  
09:45:57 10 continued to work for Family Dollar, the damages would  
09:45:59 11 come up to today. But for those who quit or were  
09:46:06 12 discharged between the date of the filing of the  
09:46:15 13 lawsuit, the damages would cease as of the date of the  
09:46:19 14 discharge.

09:46:20 15 Now, with respect to the opt-in plaintiffs,  
09:46:23 16 their damages would start two days from the date of  
09:46:28 17 their opt-in to the lawsuit. And you've got the  
09:46:32 18 exhibits in evidence, they will reflect these dates for  
09:46:36 19 each of the plaintiffs.

09:46:43 20 If the plaintiffs prove that Family Dollar  
09:46:45 21 acted willfully, then instead of two years, you would  
09:46:51 22 back up three years from the date that the lawsuit was  
09:46:57 23 filed, or the date on which the plaintiff intervened in  
09:47:01 24 this lawsuit.

09:47:04 25 Of course, the fact that I've given you

09:47:07 1 instructions on the issue of damages, except with  
09:47:12 2 respect to the 162 plaintiffs that I've told you about,  
09:47:16 3 the fact that I've given you these instructions should  
09:47:24 4 not be interpreted by you as an indication that I  
09:47:25 5 believe that the plaintiffs should or should not win  
09:47:28 6 this case.

09:47:32 7 Any verdict you reach in the jury room must  
09:47:34 8 be unanimous. In order to return a verdict, all of you  
09:47:39 9 must agree to it. Your deliberations will be in secret;  
09:47:43 10 you will never have to explain your verdict to anyone.  
09:47:47 11 It is your duty as jurors to consult with one another,  
09:47:52 12 discuss the case, in an effort to reach agreement.

09:47:57 13 Each of you must decide the case for  
09:48:00 14 yourself, but only after a full consideration of all of  
09:48:04 15 the evidence in the case with your fellow jurors. In  
09:48:09 16 the course of your discussions, do not hesitate to  
09:48:16 17 re-examine your own views and to change your mind if you  
09:48:24 18 become convinced that your position is wrong. But don't  
09:48:28 19 give up your honest beliefs just because others think  
09:48:32 20 differently, or merely to get the case over with.

09:48:36 21 Ladies and gentlemen, I remind you that you  
09:48:42 22 have no side in this case. You are judges -- judges of  
09:48:48 23 the facts. Your only interest is to seek the truth from  
09:48:53 24 the evidence in the case.

09:48:57 25 When you retire to the jury room, you will

09:49:00 1 first select one of you as the foreperson. The  
09:49:04 2 foreperson will preside over your deliberations and  
09:49:07 3 speak for you here in court.

09:49:11 4 We are going to ask you to complete answers  
09:49:17 5 to certain questions, which we're going to put to you.  
09:49:20 6 And these answers will constitute your verdict. I'll  
09:49:28 7 just go over those questions now.

09:49:31 8 The first question deals with the 162  
09:49:35 9 plaintiffs who have received judgment as a matter of law  
09:49:38 10 and for which you have to compute damages. The first  
09:49:42 11 question is this: What amount of overtime pay do you  
09:49:45 12 award to the 162 plaintiffs for whom the defendant,  
09:49:48 13 Family Dollar Stores, Inc., has not met the two  
09:49:52 14 full-time employees or their equivalent requirements?

09:49:56 15 And you will fill in the blank. Your answer  
09:50:00 16 will reflect whether you have found that the plaintiffs  
09:50:09 17 have carried their burden of proof of willfulness. Put  
09:50:14 18 another way, if the plaintiffs have not carried their  
09:50:18 19 burden of proof, the amount you put in this -- these 162  
09:50:22 20 plaintiffs -- have not carried their burden of proof  
09:50:25 21 figure that you put in this blank will reflect two years  
09:50:30 22 of backpay; that is, two years prior to the date on  
09:50:35 23 which they opted in to the lawsuit or filed the lawsuit.

09:50:41 24 If you find that they have carried their  
09:50:45 25 burden of proof of willfulness, the limitation period

09:50:49 1 will be three years.

09:50:53 2           Question 2: Do you find that the Family  
09:50:56 3 Dollar Stores has probably proved that the plaintiffs  
09:51:00 4 were exempt executive employees under the Fair Labor  
09:51:04 5 Standards Act? And using the instructions that I will  
09:51:07 6 -- that I have given you, you will answer that question  
09:51:11 7 "yes" or "no". And Family Dollar will have carried its  
09:51:17 8 burden if it proves that the executive or managerial  
09:51:23 9 responsibilities of the plaintiffs were their primary  
09:51:27 10 duty, and that the plaintiffs supervised two or more  
09:51:32 11 full-time employees or their equivalent.

09:51:36 12           If it fails to prove any one or both of  
09:51:42 13 those things, then your answer will be "no". If it  
09:51:46 14 proves both of those things, your answer will be "yes".  
09:51:50 15 And if you answer "yes", then you won't answer any other  
09:51:55 16 questions, because the plaintiffs will have lost.

09:52:01 17           Question 3 is: What amount of overtime pay  
09:52:04 18 are the plaintiffs entitled to? And you will fill in  
09:52:11 19 the amount using the two-year statute, if you find  
09:52:15 20 willfulness -- I'm sorry -- if you find -- if you don't  
09:52:21 21 find willfulness, and three years if you find  
09:52:25 22 willfulness.

09:52:29 23           And Question Number 4 -- I've got 3 two  
09:52:34 24 times here on this page, but I'll change it before I  
09:52:37 25 give it to you. Question Number 4: Do you find that

09:52:41 1 the plaintiffs have probably proved that Family Dollar  
09:52:43 2 Stores, Inc., acted willfully? And you'll answer that  
09:52:47 3 question "yes" or "no". Of course, as it turns out, you  
09:52:51 4 will answer -- you will really answer this question  
09:52:54 5 first, because in order to determine whether the 162  
09:52:58 6 plaintiffs are entitled to the three-year limitation  
09:53:02 7 period or the two-year limitation period, you will have  
09:53:06 8 to determine whether the defendant acted willfully.

09:53:12 9 Well, actually, let me change that a little  
09:53:15 10 bit. The first thing you've got to determine is whether  
09:53:20 11 Question Number 2: Did Family Dollar prove that these  
09:53:25 12 employees were executive employees? But you'll have  
09:53:31 13 these questions with you in the jury room when you  
09:53:34 14 retire, along with the exhibits.

09:53:42 15 If at any time during your deliberations you  
09:53:46 16 wish to ask a question, send a message or note to me,  
09:53:55 17 please reduce your question, note, or message to  
09:54:02 18 writing, signed by the foreperson, and give it to the  
09:54:07 19 Court Security Officer or the courtroom deputy, who will  
09:54:10 20 bring it to me, and I will respond as promptly as  
09:54:14 21 possible, either by writing or having you return to the  
09:54:16 22 courtroom so that I can address you orally.

09:54:19 23 I caution, however, with respect to any  
09:54:21 24 message or question you might send, that you should not  
09:54:24 25 tell me your numerical division at the time.

09:54:30 1 Counsel will approach the bench.

09:54:52 2 (At the bench:)

09:54:52 3 THE COURT: All of your objections that you  
09:54:56 4 previously raised are preserved for the record.

09:55:00 5 Are there any additional objections?

09:55:06 6 MR. ST. CLAIR: I'll speak first, Your  
09:55:10 7 Honor. I think you misspoke and said the new  
09:55:12 8 regulations came into effect April 23rd, and it's  
09:55:15 9 actually August 23.

09:55:16 10 THE COURT: Yeah, okay.

09:55:18 11 MR. ST. CLAIR: That may need to be  
09:55:19 12 clarified. But I would also point out, Your Honor, that  
09:55:22 13 none of the testifying plaintiffs, none of the  
09:55:25 14 representative plaintiffs were employed after August 23,  
09:55:29 15 2004. So we would object to even charging on the period  
09:55:34 16 after August 23, 2004. But I do think that date needs  
09:55:38 17 to be corrected.

09:55:39 18 THE COURT: All right.

09:55:39 19 MR. ST. CLAIR: The other thing, Your Honor,  
09:55:41 20 is on the verdict form. I think that Question 2 should  
09:55:46 21 be worded to exclude the "162 for which judgment as a  
09:55:51 22 matter of law has been entered". And also the damage  
09:55:55 23 calculation Question 3, it should also exclude the 162.  
09:56:01 24 Otherwise, the jury may -- you see, award backpay for  
09:56:06 25 that same 162 twice.

09:56:08 1 THE COURT: Yeah.

09:56:09 2 MR. JOHNSON: Your Honor, with respect to  
09:56:10 3 the 162 plaintiffs on which you found judgment as a  
09:56:12 4 matter of law, to show willfulness on the two FTE issue,  
09:56:21 5 there actually will be more plaintiffs included in the  
09:56:23 6 calculation, and that goes to Defendant's 1742F. If you  
09:56:29 7 go back three years, the two-year calculation is only  
09:56:33 8 162; with the three-year, we go to 1742F with the names.

09:56:38 9 MR. ST. CLAIR: Your Honor, just for the  
09:56:40 10 record, we would object to Your Honor instructing the  
09:56:42 11 jury as to which evidence they should refer to in their  
09:56:48 12 deliberations.

09:56:49 13 THE COURT: Well, I -- I find that you  
09:56:52 14 waived that objection, because when I have referred to  
09:56:56 15 that exhibit and I gave them the instructions yesterday,  
09:57:01 16 you didn't object. But...

09:57:05 17 MR. R. WIGGINS: Judge, could I ask a  
09:57:06 18 question? When you said that our prior objections were  
09:57:12 19 preserved, were you including from June -- our  
09:57:15 20 objections in June, you were including those?

09:57:18 21 THE COURT: To the extent that I've given  
09:57:20 22 the same instructions here, yes, sure.

09:57:22 23 MR. R. WIGGINS: Okay.

09:57:32 24 (End of bench conference.)

09:57:34 25 THE COURT: Ladies and gentlemen, the

09:57:35 1 lawyers have called to my attention that I used the word  
09:57:40 2 April 2004. It should have been August. August.

09:57:45 3 And secondly, I take it that you know that  
09:57:51 4 if the -- that the backpay, if you find that the  
09:57:57 5 defendant has not carried its burden of proof, the  
09:58:00 6 backpay for the other plaintiffs, that the total amount  
09:58:07 7 that's reflected in the appropriate exhibit, that you'll  
09:58:11 8 deduct the amount that you've already taken out for the  
09:58:15 9 162 plaintiffs.

09:58:20 10 In other words, 162 plaintiffs are not to be  
09:58:23 11 paid twice. There won't be any double recovery for  
09:58:28 12 them.

09:58:29 13 And should you find that the defendant has  
09:58:34 14 acted willfully, then the three-year -- the computations  
09:58:40 15 for the three-year period are shown in Defendant's  
09:58:48 16 Exhibit 1742F.

09:58:54 17 You may retire to consider your verdict.

09:58:58 18 (Jury out to consider verdict at 9:50 a.m.)

09:59:35 19 THE COURT: We'll be in recess until the  
09:59:38 20 call of the jury.

11:29:10 21 (Jury has question at 11:20 a.m.)

11:29:24 22 THE COURT: I'll give the lawyers a chance  
11:29:29 23 to confer with their respective sides about the  
11:29:32 24 appropriate answer to the inquiry.

11:29:49 25 MR. MAY: Your Honor, Mr. St. Clair was

11:29:53 1 outside.

11:29:53 2 THE COURT: All right.

11:29:55 3 MR. MAY: They went to get him.

11:32:04 4 THE COURT: Has everyone seen the note?

11:32:07 5 MR. MAY: I wanted to be sure I quoted it  
11:32:10 6 correctly to Mr. St. Clair.

11:32:12 7 MR. ST. CLAIR: Will that be made a court  
11:32:14 8 exhibit?

11:32:14 9 THE CLERK: It will become part of the  
11:32:16 10 record.

11:32:16 11 MR. ST. CLAIR: Yeah. Yeah.

11:33:03 12 THE COURT: What is the suggested response  
11:33:05 13 from the plaintiffs to the note -- for the record, let  
11:33:10 14 me first read the note: "Judge, what do we base our  
11:33:16 15 dollar amount on for all reported hours over 52?  
11:33:23 16 Thanks. Marcus Campbell."

11:33:26 17 What is the suggestive response of the  
11:33:28 18 plaintiffs to the inquiry?

11:33:33 19 MR. JOHNSON: Well, Your Honor, it's a  
11:33:37 20 little ambiguous as to whether they're asking for --  
11:33:43 21 like reference to an exhibit, or they're asking for  
11:33:46 22 reference to a calculation.

11:33:50 23 If they're asking for a reference to a  
11:33:52 24 calculation, then the inference from the 52 would lead  
11:33:58 25 to one way, but I mean, we can't make that inference

11:34:01 1 without knowing exactly whether they're basing this on a  
11:34:06 2 40-hour or 52-hour calculation. If it's 52, then, of  
11:34:10 3 course, as we discussed yesterday, it's half of the  
11:34:13 4 overtime rate, which is the half rate of the regular  
11:34:16 5 rate up to 52, and then time and a half over that.

11:34:20 6 Now, the jury, we can give them that number,  
11:34:24 7 but with respect to them calculating damages, I don't  
11:34:27 8 know how they'd do that without, of course, a lot of  
11:34:30 9 other factors and variables.

11:34:32 10 If they're looking for a particular number,  
11:34:34 11 or looking for a particular exhibit, with respect to  
11:34:38 12 what backpay would be based upon, if it's a 52-hour  
11:34:43 13 workweek, then -- let me check and see here -- then  
11:34:52 14 Defendant's Exhibit 1959A, which has a 52-hour  
11:35:00 15 calculation -- I'm sorry, Your Honor -- and they have  
11:35:04 16 two columns there, one for two-year and one for three-  
11:35:07 17 year, if it's willful.

11:35:11 18 The two-year calculation on 52 hours is  
11:35:16 19 \$13,720,958.64. The three-year calculation, based upon  
11:35:26 20 52 hours, is \$19,091,003.39. And if I understand  
11:35:41 21 correctly, this Defendant's Exhibit -- this is 1959A;  
11:35:46 22 that would include the plaintiffs who you awarded the  
11:35:52 23 two FTE judgment on, the 162.

11:35:58 24 THE COURT: What is the suggestive response  
11:36:01 25 of the defendants?

11:36:05 1 MR. ST. CLAIR: Your Honor, we don't  
11:36:08 2 understand what the question is intended to ask about.  
11:36:15 3 So, we're not able to provide the Court a suggested  
11:36:20 4 answer to the question, because we just don't know what  
11:36:23 5 the question is.

11:36:24 6 So, I -- I guess I would have two thoughts,  
11:36:27 7 Your Honor. One would be to say that to the extent  
11:36:34 8 you're calculating damages, that should be done based  
11:36:37 9 upon the evidence presented and the law that I've  
11:36:44 10 instructed you on.

11:36:45 11 The other option, Your Honor, and this may  
11:36:47 12 be a better one, is that in the Court's wisdom, you may  
11:36:52 13 be able to communicate to the jury that the Court is not  
11:36:59 14 understanding the jury's question. And maybe if the  
11:37:03 15 jury could reformulate the question, then the Court  
11:37:07 16 might be able to supply an answer.

11:37:11 17 THE COURT: It's my perception that the jury  
11:37:15 18 is asking, where do we go to find the dollar amount for  
11:37:39 19 the reported hours over 52? And I can understand that  
11:37:53 20 inquiry, in view of the large number of exhibits that  
11:37:59 21 are in evidence.

11:38:11 22 Did Dr. Bradley offer any exhibits on this  
11:38:14 23 issue?

11:38:15 24 MR. R. WIGGINS: Dr. Bradley did a 40 and a  
11:38:18 25 48; the defendant did the 52.

11:38:21 1 THE COURT: All right. Okay. All right.

11:38:26 2 MR. ST. CLAIR: And, again, Your Honor, it's  
11:38:29 3 not clear to the defendant which group this question  
11:38:33 4 refers to; whether this is referring to the group of 162  
11:38:39 5 or the balance.

11:38:43 6 THE COURT: Well, I assume that they're  
11:38:45 7 talking about both groups.

11:38:49 8 MR. R. WIGGINS: Both groups are on the  
11:38:52 9 exhibit -- are on the exhibit Mr. Johnson gave you. I  
11:38:56 10 forgot the number.

11:38:57 11 MR. JOHNSON: 1959A.

11:39:00 12 THE COURT: Yes. Does the defendant know of  
11:39:02 13 any other exhibit, other than 1959A, which bears  
11:39:08 14 directly on this question?

11:39:11 15 MR. ST. CLAIR: No, Your Honor.

11:39:13 16 THE COURT: All right.

11:39:55 17 MR. ST. CLAIR: The only other document,  
11:40:00 18 Your Honor, would be the one referred to in Your Honor's  
11:40:02 19 charge that relates to that group of 162. That's the  
11:40:08 20 1742 --

11:40:09 21 MR. JOHNSON: 1742C and F. C is the two-  
11:40:13 22 year; and F is the three-year.

11:40:15 23 MR. ST. CLAIR: Three-year. So that -- that  
11:40:22 24 -- and of course, here's a bit of my confusion about it  
11:40:27 25 when they're saying for hours over 52. These charts are

11:40:31 1 based on taking the salary -- based on the assumption  
11:40:37 2 that the salary is intending to compensate for 52 hours.

11:40:40 3 THE COURT: Yes.

11:40:42 4 MR. ST. CLAIR: That formula we talked about  
11:40:43 5 earlier. So that would be the exhibits.

11:40:45 6 THE COURT: All right. Well, my tentative  
11:40:59 7 response is this: The parties have agreed that  
11:41:07 8 Defendant's Exhibits 1959A and 1742C are the only ones  
11:41:16 9 bearing relative to the question.

11:41:24 10 MR. JOHNSON: It's -- subject to the  
11:41:26 11 understanding, Your Honor, that their question means  
11:41:32 12 that 52 hours is what the salaries were intended to  
11:41:35 13 compensate.

11:41:36 14 THE COURT: That's the only -- what other  
11:41:38 15 inference would you draw from the question?

11:41:39 16 MR. JOHNSON: That's about it, Your Honor.

11:41:46 17 MR. R. WIGGINS: There was the one nuance,  
11:41:48 18 Judge, that it was 48, then it changed to 52 at some  
11:41:51 19 point during in the six-year period.

11:41:54 20 THE COURT: Yeah. Well, they're asking  
11:41:56 21 about the 52.

11:42:01 22 Objections to the Court's proposed charge?  
11:42:06 23 We'll be in recess subject to the call of  
11:43:04 24 the jury.

11:43:05 25 MR. JOHNSON: Your Honor, I just wanted --

11:43:07 1 somebody pointed out that when you listed the exhibits  
11:43:10 2 that you were going to reference to the jury, you said  
11:43:12 3 1959A and 1742C, but you may have missed 1742F as well;  
11:43:21 4 and F is the three-year.

11:43:24 5 THE COURT: Okay. So it's 1742F, in  
11:43:31 6 addition to C?

11:43:32 7 MR. JOHNSON: Yes, sir.

11:43:58 8 THE COURT: All right. Thank you.

11:44:00 9 MR. KALLON: Your Honor, I've got an  
11:44:02 10 unrelated matter very quickly, administrative. The  
11:44:05 11 slides that I used in my closing argument yesterday --

11:44:08 12 THE COURT: Yes, sir.

11:44:09 13 MR. KALLON: -- which are not exhibits for  
11:44:11 14 the jury, but for the record, are Defendant's Exhibits  
11:44:13 15 2360 -- give those to Mr. Smitherman.

11:44:24 16 MR. CALAMUSA: And for the plaintiffs, it's  
11:44:25 17 Plaintiffs' Exhibit 300.

11:44:27 18 THE COURT: All right.

11:45:39 19 MR. KALLON: Are we excused?

11:45:40 20 THE COURT: Oh, yes. You're excused. Don't  
11:46:04 21 go very far.

11:46:04 22 (Jury continuing to deliberate at 11:38 a.m.)

11:48:54 23 (Jury has verdict at 11:40 a.m.)

11:48:54 24 THE COURT: Let's bring the jury.

11:49:01 25 (In open court, jury present at 11:43 a.m.)

11:49:41 1 THE COURT: Ladies and gentlemen, have you  
11:49:43 2 reached a verdict?

11:49:44 3 THE FOREMAN: Your Honor, we have.

11:49:45 4 THE COURT: The clerk will receive the  
11:49:47 5 verdict. The clerk will read the verdict.

11:49:53 6 The clerk has directed me to read the  
11:50:00 7 verdict.

11:50:03 8 "Question 1: What amount of overtime pay do  
11:50:06 9 you award to the 162 plaintiffs for whom the defendant  
11:50:09 10 Family Dollar Stores, Inc., has not met the 'two  
11:50:13 11 full-time employees or their equivalent' requirement?  
11:50:17 12 The answer is \$1,575,932.12.

11:50:22 13 "Question Number 2: Do you find that the  
11:50:25 14 Family Dollar Stores, Inc., has probably proved that the  
11:50:29 15 plaintiffs were exempt executive employees under the  
11:50:31 16 Fair Labor Standards Act? The answer is no.

11:50:36 17 "Question Number 3: What amount of overtime  
11:50:39 18 pay are the plaintiffs entitled to? And the answer is  
11:50:44 19 \$17,516,071.27.

11:50:49 20 "Question Number 3: Do you find that the  
11:50:52 21 plaintiffs have probably proved that Family Dollar  
11:50:55 22 Stores, Inc., acted 'willfully' in denying overtime pay  
11:51:00 23 to the plaintiffs? The answer is "yes."

11:51:02 24 Is there a request that the jury be polled?

11:51:04 25 MR. ST. CLAIR: There is, Your Honor.

11:51:06 1 THE COURT: The clerk will poll the jury.

11:51:07 2 THE CLERK: As I poll your name, please,  
11:51:11 3 state whether this is your true verdict or not.

11:51:11 4 (Jury polled.)

11:51:53 5 THE COURT: Ladies and gentlemen, would you  
11:51:54 6 mind retiring back to the jury room one more time?

11:52:11 7 (In open court, jury out at 11:46 a.m.)

11:52:16 8 THE COURT: Is there any claim of  
11:52:21 9 inconsistency of the verdict?

11:52:25 10 MR. ST. CLAIR: The one thing that I am not  
11:52:26 11 able to do immediately, Your Honor, is determine whether  
11:52:30 12 the backpay for Question 1 has been subtracted from the  
11:52:35 13 amount in Question 3. I just don't have the numbers in  
11:52:38 14 front of me. But it's this double recovery issue we  
11:52:43 15 talked about at the end of the jury charge --

11:52:45 16 THE COURT: All right. I want the parties  
11:52:47 17 to have the option right here and now of bringing to the  
11:52:56 18 Court the proceeding of any inconsistency in the verdict  
11:52:59 19 so that we can have the jury reconcile the  
11:53:02 20 inconsistency, assuming that there is one.

11:53:06 21 It seems to me that it's simply a matter of  
11:53:09 22 taking the relevant exhibit and the total amount for all  
11:53:18 23 of the plaintiffs and deducting that \$1.5 million from  
11:53:22 24 it and see where you are.

11:54:02 25 MR. CALAMUSA: Can we have the verdict form

11:54:03 1 to do the math?

11:54:36 2 MR. ST. CLAIR: While they're deciphering  
11:54:39 3 over there, Your Honor, does Your Honor contemplate  
11:54:42 4 counsel having an opportunity to talk to the jury here  
11:54:45 5 in the courtroom, or would you prefer that be done  
11:54:48 6 later?

11:54:48 7 THE COURT: Well, do y'all want to talk to  
11:54:50 8 them?

11:54:50 9 MR. WHITE: Not in the courtroom.

11:54:53 10 THE COURT: Pardon me?

11:54:54 11 MR. WHITE: The last time you brought them  
11:54:56 12 in the box. And I think if you tell them they can talk  
11:55:00 13 to us, fine, but the last session where you actually,  
11:55:04 14 you know -- I -- I didn't like that.

11:55:08 15 I mean, if the Court will let them talk to  
11:55:10 16 us, let them decide what they want to do. But that  
11:55:14 17 inquisition about --

11:55:16 18 THE COURT: Well, I don't -- I will ask  
11:55:18 19 them --

11:55:20 20 MR. WHITE: Okay.

11:55:21 21 THE COURT: -- whether they either want to  
11:55:24 22 talk to you or want to let you ask some questions off  
11:55:28 23 the record.

11:55:29 24 MR. WHITE: That's fine.

11:55:30 25 THE COURT: And those who don't want to do

11:55:32 1 it, I will thank them and let them go; and those that  
11:55:34 2 want to do it, I'll let you talk to them.

11:55:37 3 MR. ST. CLAIR: But not here in the --

11:55:39 4 THE COURT: Yeah. Right here while they're  
11:55:42 5 sitting.

11:55:49 6 MR. ST. CLAIR: It appears that there was a  
11:55:51 7 thousand dollar error done in the jury's calculation,  
11:55:55 8 Your Honor.

11:55:56 9 THE COURT: Well, you want me to send it  
11:56:00 10 back to the jury to make that change?

11:56:05 11 MR. ST. CLAIR: Well, I don't know. Which  
11:56:06 12 way does the error go? You know, some of those errors  
11:56:15 13 on your bank statement you call the bank about and some  
11:56:17 14 of them you don't.

11:56:19 15 MR. R. WIGGINS: It's in their favor. If  
11:56:21 16 they'll just tell us that I'll give it to them, we'll  
11:56:25 17 call it --

11:56:31 18 THE COURT: It was?

11:56:35 19 MR. R. WIGGINS: It's in their favor.

11:56:37 20 MR. ST. CLAIR: Never mind.

11:56:38 21 THE COURT: All right. Let's bring in the  
11:56:40 22 jury. You can be seated.

11:57:19 23 (Jury in court at 11:50 a.m.)

11:57:19 24 (In open court, jury present.)

11:57:20 25 THE COURT: Ladies and gentlemen, thank you

11:57:21 1 so much for your sacrifices these last two weeks. It's  
11:57:27 2 been an extremely valuable public service that you have  
11:57:33 3 rendered. As you may have guessed, this is not the  
11:57:37 4 first time this case has been tried. And the last jury  
11:57:43 5 was not able to reach a verdict. And I'm happy that you  
11:57:46 6 were able to resolve this dispute for us.

11:57:51 7 With our lasting gratitude, you're now  
11:57:55 8 excused. But before you go, let me say this to you:  
11:58:01 9 The lawyers -- at least some of them, at least -- want  
11:58:06 10 to talk to you. As I said to you, you don't have to  
11:58:10 11 talk with anybody about this case if you don't want to.  
11:58:12 12 And if you don't mind talking with them, fine. If you  
11:58:19 13 don't want to talk with them, those of you who don't,  
11:58:25 14 you can leave right now and I'll have everybody wait  
11:58:28 15 here until you get out of the building.

11:58:30 16 If you don't mind talking with them and  
11:58:32 17 sharing your thoughts or whatever it is with them, you  
11:58:35 18 can stay here. And we'll give about 10 or 15 minutes  
11:58:41 19 for them to ask questions, or for you to ask them  
11:58:43 20 questions. And we'll handle it however you wish.

11:58:48 21 Those of you who want to leave now, thank  
11:58:51 22 you so much, again, and have a good weekend. Those who  
11:58:56 23 want to stay can stay and either say what you want to  
11:58:59 24 say or answer whatever questions the lawyers want to put  
11:59:02 25 to you. But even if you stay and they ask you a

11:59:05 1 question, you don't have to answer it.

11:59:08 2 All right. Those that want to leave, thank  
11:59:11 3 you now.

11:59:29 4 (All jurors left.)

11:59:37 5 THE COURT: Y'all stay here a minute,  
11:59:39 6 because there's still the issue --

11:59:41 7 MR. ST. CLAIR: One issue I want to remind  
11:59:43 8 the Court --

11:59:43 9 THE COURT: The bankruptcy issue.

11:59:45 10 MR. ST. CLAIR: -- the bankruptcy issue and  
11:59:48 11 Your Honor said, let's see what the verdict is and we  
11:59:50 12 can submit the documents later. We can either do that  
11:59:53 13 now -- so -- or we can do it later. I don't think it  
12:00:00 14 has to be done here today.

12:00:01 15 THE COURT: It doesn't have to be done here  
12:00:03 16 today. What I'd like the defendant to do, because I --  
12:00:11 17 I'm going to grant the motion. I think under existing  
12:00:17 18 Eleventh Circuit law, I have to. I'm going to grant the  
12:00:21 19 motion.

12:00:21 20 And so what I'd like the defendant to do  
12:00:28 21 within the next week, by next Friday, is to serve on the  
12:00:33 22 Court and counsel for the plaintiffs, the names of the  
12:00:39 23 bankrupt plaintiffs and the amount to be deducted from  
12:00:45 24 the award that's been entered. And then by Friday, the  
12:00:55 25 17th, plaintiffs' counsel will respond. And after that,

12:01:03 1 I'll issue a final judgment.

12:01:08 2 Is there any suggested change in that  
12:01:12 3 procedure? Mr. Johnson?

12:01:14 4 MR. JOHNSON: Other than the ruling itself,  
12:01:16 5 Your Honor, I don't think we have any objection to it.  
12:01:18 6 I mean --

12:01:19 7 THE COURT: Well, if you can give me some  
12:01:21 8 Eleventh Circuit authority which says that I have any  
12:01:25 9 discretion whatsoever -- incidentally, I think the  
12:01:28 10 Eleventh Circuit probably hasn't taken into account the  
12:01:33 11 decisions which indicate that it's -- the district court  
12:01:36 12 has no discretion in the matter.

12:01:38 13 MR. JOHNSON: Supreme Court says --

12:01:40 14 THE COURT: There is a Supreme Court --  
12:01:41 15 there is Supreme Court case which says to the contrary,  
12:01:43 16 but I believe that some of the Eleventh Circuit cases  
12:01:47 17 have come down even after the Supreme Court case,  
12:01:49 18 haven't they?

12:01:49 19 MR. JOHNSON: That's true, Your Honor,  
12:01:51 20 butk--

12:01:52 21 THE COURT: And so if they've come down  
12:01:54 22 after the Supreme Court case, I'm bound by the Eleventh  
12:01:57 23 Circuit.

12:01:57 24 MR. JOHNSON: That's true, Your Honor, to  
12:01:59 25 the extent that the Eleventh Circuit interpreted Supreme

12:02:03 1 Court precedent correctly. And in this instance, we  
12:02:07 2 argue that the esteemed Eleventh Circuit did not do so  
12:02:11 3 with respect to *New Hampshire versus Maine*.

12:02:14 4 THE COURT: But I don't recall whether the  
12:02:16 5 Eleventh Circuit's subsequent decisions mentioned *New*  
12:02:24 6 *Hampshire*.

12:02:24 7 MR. JOHNSON: Yes. There is one -- I left  
12:02:29 8 the reference, Your Honor -- one case that mentioned --  
12:02:32 9 no, they really haven't discussed it.

12:02:34 10 THE COURT: All right. Well, I'll take  
12:02:38 11 anything you have on the issue. You can submit the  
12:02:40 12 briefs by next Friday as well.

12:02:42 13 But my present feeling is that I have no  
12:02:47 14 discretion but to hold that the defendant -- that  
12:02:51 15 plaintiffs who have filed bankruptcy petitions under any  
12:02:58 16 Chapter and have failed to list the Family Dollar  
12:03:04 17 lawsuit as an asset, are judicially estopped from  
12:03:11 18 recovering from this action.

12:03:14 19 MR. ST. CLAIR: One final matter, Your  
12:03:16 20 Honor, is the matter of liquidated damages.

12:03:18 21 THE COURT: Yes, sir.

12:03:20 22 MR. ST. CLAIR: We would ask the Court's  
12:03:22 23 indulgence to allow us to submit a brief to Your Honor  
12:03:25 24 on that issue. We can do it within whatever reasonable  
12:03:29 25 period the Court requires.

12:03:33 1 MR. JOHNSON: Well, Your Honor, we would  
12:03:34 2 like to move for liquidated damages at this point, so --  
12:03:39 3 present that issue to the Court --

12:03:41 4 THE COURT: All right. The defendant will  
12:03:43 5 respond to the motion by next Friday.

12:03:49 6 MR. ST. CLAIR: Next Friday. Yes, Your  
12:03:51 7 Honor.

12:03:51 8 THE COURT: Yes. All right. Anything else?

12:03:54 9 MR. R. WIGGINS: Your Honor, I had thought  
12:03:56 10 that the charge at one point had said if they found  
12:03:58 11 willfulness, it would be doubled.

12:04:01 12 MR. ST. CLAIR: His Honor corrected that.

12:04:03 13 THE COURT: I left that out of the charge.

12:04:05 14 MR. R. WIGGINS: Okay.

12:04:11 15 THE COURT: Thank you.

12:04:16 16 MR. WHITE: We're gone, Judge.

12:04:26 17 (Court adjourned at 11:56 a.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in cursive script that reads "Christina K. Decker". The signature is written in black ink and is positioned above a horizontal line.

Christina K. Decker, RPR, CRR  
Federal Official Court Reporter

\_\_\_\_\_  
Date